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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1193

UNITED STATES OF AMERICA, *Appellant*

v.

TRAVIS PAUL ENMONS, JACKIE J. BENDO, ED WAYNE BARTON AND MILTON RAY WOODWARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of this Court, Appellees respectfully move that the appeal herein be dismissed or that the judgment below be affirmed without further argument.

STATEMENT

Appellees accept the Government's statement of the case. (JS 3-5).[1]

ARGUMENT

I. The Appeal Should Be Dismissed.[2]

a. The Government's thesis on this appeal is that it is a violation of the Hobbs Act, 18 U.S.C. § 1951, punishable by up to 20 years' imprisonment, for members of a labor union to engage in "violence" in pursuit of a legitimate labor

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[1] "JS" refers to the Jurisdictional Statement.

[2] The motion to dismiss is based on Rule 16(1)(d):

"(d) The court will receive a motion to dismiss or affirm on any other grounds which the appellee wishes to present as reasons why the court should not set the case for argument."

It is implicit in the Court's adoption of this Rule to supplement 16(1)(a), (b) and (c) that an appeal may be dismissed even when there is jurisdiction to entertain it.

"Pursuant to Rule 16(1)(d), which was added in the 1967 rule revision, the Court will also receive a motion to dismiss or affirm

objective, namely, to secure "higher wages and other union contract demands." (JS 2.) Endorsement of that "expansive interpretation of 'extortion' used in the Hobbs Act as urged by the Government"[3] is sought in this Court although the Government is unable to point to a single precedent accepting its theory and fails to address itself to the analysis of the Act made by a unanimous Court of Appeals for the Ninth Circuit in *United States* v. *Caldes*[4] which is equally dispositive here.[5]

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containing "any other grounds which the appellee wishes to present as reasons why the court should not set the case for argument." This indicates that an important purpose of a motion to dismiss or affirm is the same as that of a brief in opposition to a petition for certiorari—i.e., to present *all* reasons why oral argument is not justified and why the decision below should not be altered or reviewed, without limitation to jurisdictional defects or lack of substantiality of the questions. It may thus be urged in the motion that the case is not important, or that there is an absence of any conflict of opinions, or that the decision below is so obviously correct as to warrant no further review." Stern and Gressman, *Supreme Court Practice*, 4th ed. 1969, pp. 357-358.

Cf. Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 496-497, holding that this Court is not required to exercise even that jurisdiction which is derived directly from Art. III, § 2 of the Constitution.

[3] JS 25a. The quotation is from *United States* v. *Caldes*, 79 LRRM 2598 (9th Cir.) (Jertberg and Eugene A. Wright, C.JJ. and Williams, D.J.), reprinted at JS 17a-26a.

[4] See n. 3, *supra*. *Caldes* was decided on the basis of the most elaborate possible presentation of the Government's position, special leave having been granted the Department of Justice to file a supplemental brief, which contained a full-dress exposition of the arguments which could be mustered in support of the Government's theory.

[5] The Government would limit *Caldes* to its particular facts (JS 9-11). But while the Court of Appeals properly directed its attention to the circumstances of the case before it, its reasoning deals broadly with the "use of violence during a strike" (JS 25a). A few examples will suffice: (1) The Court of Appeals' discussion of the critical term "extortion" as used in the Hobbs Act teaches that the presence of extortion depends not on the *intensity* of coercion, but on the *objective* sought to be achieved thereby (JS 23a-24a). The Court quoted the Government's position in the *Local 807* case and observed that its definition of extortion there was inconsistent with its position here (JS 26a; see also p. 12 *infra*); (2) The Court recognized that, in the year after the Hobbs Act was passed, Congress amended the Taft-Hartley Act to provide that union violence would be unfair labor practice, and regarded it to be "significant that during congressional deliberations on the bill no congressman expressed an opinion that the Hobbs Act of the preceding year covered union violence while a strike was in progress" (JS 25a); (3) The Court rejected the Government's effort to use this Court's carefully narrow decision in *Green* as a precedent for its position in this case (JS 22a-23a; see pp. 6-7 *infra*).

b. Whereas the only two courts that have written on the subject agree that acts of violence in the course of a legitimate labor dispute should be left to the processes of state law (*Enmons*, JS 10a; *Caldes*, JS 26a), the Government's interpretation of the Hobbs Act remains in flux. Originally, and with but a single exception in the first 23 years after the Hobbs Act became law, the Justice Department's position, as evidenced by its practice, was that violence "for the purpose of coercing the employer to consent to higher wages and other union demands" (JS 2) does *not* constitute a violation of the Hobbs Act. Then, in 1970, the indictments here and in *Caldes* were brought on the premise that the Hobbs Act does apply in such circumstances. But the Jurisdictional Statement fails to formulate a definitive position with respect to the Government's new theory:

As appears from its decision to bring the *Caldes* prosecution, the Government originally regarded the degree of violence to persons or property to be irrelevant to its basic theory. Having lost *Caldes*, the Government chooses for present purposes to read the Ninth Circuit's decision as turning on the degree of violence in that case, but nevertheless does not state whether it now believes that minor violence is excluded.

Acknowledging that "often in legitimate labor disputes, tempers grow short, blows are struck on the picket line, and minor but intentional damage is done to the property of the employer" (JS 11), the Government is as yet uncertain ("Perhaps," *id.*) whether the Hobbs Act reaches such conduct.

Finally, there has been a change of theory even within the present prosecution. The indictment herein alleges that defendants committed the violent acts charged "in order to force said Company to agree to a contract with Local 2286 of the International Brotherhood of Electrical Workers calling for higher wages and other monetary benefits." (JS 14a.) Thus the existence of the objective of securing a better collective bargaining agreement is an essential element of the affirmative case stated in the indictment. The

Government now says that it "could be raised as a *defense* at trial that the acts in question were not intended to coerce the employer * * *." (JS 11, n. 3; emphasis added.)

c. The Government has not gained lower court approval of its construction of the Hobbs Act, and has found no answer to appellate objections which cut to the heart of its theory. Its own position is still at an evolutionary stage. In this posture of the issue, plenary consideration by this Court would be decidedly premature. Important considerations of judicial administration, as envisaged by Rule 16(1)(d) are at stake. In Mr. Justice Frankfurter's words:

> "it suffices to say that experience in instances of similar unclarity under the Criminal Appeals Act counsels the wisdom of abstaining from reviewing construction of a criminal statute on so cloudy a record as is now before the Court. Compare United States v. Colgate & Co., 250 U.S. 300, with United States v. A. Schrader's Son, Inc., 252 U.S. 85."[6]

In short, the Government's interpretation of the Hobbs Act has ramifications which go well beyond the present indictment and involves complexities which the Justice Department itself has not resolved. Yet it is thrust upon this Court in a form and at a time least conducive to sound adjudication.[7] Vindication of this Court's processes there-

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[6] *United States* v. *Fruehauf*, 365 U.S. 146, 158.

The example of the *Colgate* case is indeed instructive. As this Court later observed, the "Colgate decision created some confusion and doubt as to the continuing vitality of the principles announced in Dr. Miles" (an earlier antitrust case), *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 38. The immediate consequence was *Schrader's Son*, *supra*, where this Court found it necessary to reverse a district court because it had "misapprehended the meaning and effect of the opinion and judgment in" *Colgate*, 252 U.S. 85, 90. Yet notwithstanding *Schrader's Son* (another criminal appeal) widespread confusion as to the scope of *Colgate* persisted for forty years, as is described by the sharply conflicting opinions in the *Parke, Davis* case, *supra*.

[7] This was not a matter of necessity, since the Government could have sought certiorari in *Caldes*, where the statutory question was presented in the context of a full record after trial. While it suits the Government's litigation strategy in this case to distinguish, rather than confront, *Caldes*, the Government does not acknowledge that *Caldes* was rightly decided even on the Government's own narrow reading. See page 3, *supra*.

fore requires that the appeal be dismissed. To be sure, the Government would lose the present prosecution; the necessary consequence of any dismissal pursuant to Rule 16(1)(d) is that the judgment of the court below remains undisturbed.[8] But the rational development of the law under the Hobbs Act will be safeguarded. Because dismissal does not constitute a determination on the merits, the Government would remain free to pursue its theory in other cases and to refine it in the fires of litigation. Appellate consideration would be assured for the Criminal Appeals Act, as amended, now provides for an appeal to the court of appeals from an order dismissing an indictment on statutory grounds.[9] If the Government's position should prove to have sufficient merit to commend itself to any court of appeals, the conflict with *Caldes* would then bring the issue to this Court in a setting conducive to informed deliberation.

These considerations of judicial administration would be overweighed if the decision below were clearly wrong or aberrational. Rather, as is shown below, what the Jurisdictional Statement unwittingly reveals is that there is so little substance to the Government's theory that if the merits are reached, summary affirmance would be appropriate.

II. Alternatively, The Judgment Below Should Be Affirmed Without Further Argument.

The Hobbs Act proscribes interference with interstate commerce "by robbery or extortion." As this Court noted

[8] Concededly, the Court of Appeals for the Fifth Circuit would not have jurisdiction to consider the instant case pursuant to the remand procedure contained in pre-amended 18 U.S.C. § 3731, since that procedure does not apply where jurisdiction under that statute does lie in this Court, such jurisdiction being exclusive (see *United States* v. *Mersky*, 361 U.S. 431, 434).

[9] When the revision of the Criminal Appeals Act was being considered by Congress, it was emphasized that unless a ruling clearly raised problems as to the constitutionality of a Federal criminal statute, there was no good reason why Government appeals in criminal cases should not be taken first to the courts of appeals. Among other things, it was suggested that the Supreme Court "benefits significantly by having not only the instant case before it, but also from having a range of related appellate opinions from various courts of appeals." S. Rep. No. 91-1296, 91st Cong., 2d Sess. 15. See also *Id.* at 13-14, 17, 29-36; 116 Cong. Rec. 35658-35660 (1970).

in *United States* v. *Green*, 350 U.S. 415, 418-19, the Act was passed as a response to this Court's construction of Section 2 of the Federal Anti-Racketeering Act of 1934,[10] in *United States* v. *Local 807*, 315 U.S. 521, where,

> "We held in Local 807 that this exception covered members of a city truck drivers' union *offering superfluous services* to drive arriving trucks to their city destination with intent, if the truck owners refused their offer, to exact the wages by violence." *United States* v. *Green*, 350 U.S. at 419. (Emphasis added.)

As the Court stated in *Green*, "the Hobbs Act was meant to stop *just such conduct*" (350 U.S. at 420) (Emphasis added). Whereas, the 1934 Act had been limited in its application, in a labor context, to faithless union officials who utilized either violence, strikes or picketing—or threats thereof—for their personal enrichment (350 U.S. at 420), *Green* held that under the amendatory Hobbs Act, "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property." (350 U.S. at 420.)[11]

Despite the Government's contention (JS 5), it is not even seriously arguable that *Green* is inconsistent with the decision of the court below. Green was indicted for attempting to obtain "money, in the form of wages to be paid for imposed unwanted, superfluous and fictitious services" (350 U.S. at 417), which as recognized by the Court (350 U.S. at 420) was precisely the type of conduct involved in the *Local 807* case. The Court stated (350 U.S. at 421):

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[10] 48 Stat. 979. "Subsection (a) of § 2 [of the 1934 Act] barred, with respect to interstate commerce, exaction of valuable considerations by force, violence or coercion, 'not including, however, the payment of wages by a bona-fide employer to a bona-fide employee.'" 350 U.S. at 418-19.

[11] The Government's assertion that the decision below "severely curtails the reach of the Hobbs Act by limiting its ban on extortionate conduct directed against employers to situations where wages are sought for superfluous and unwanted labor" (JS 5), is anomalous. Clearly, the decision below has no effect on the traditional anti-racketeering prosecution involving personal enrichment. E.g., *United States* v. *Kramer*, 355 F.2d 891 (7th Cir.); *United States* v. *Provenzano*, 334 F.2d 678 (3d Cir.); *United States* v. *Palmiotti*, 254 F.2d 491 (2d Cir.).

"We rule only on the allegations of the indictment and hold that the acts charged against appellees fall within the terms of the Act."

Of course, "the new [Hobbs] Act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship." 350 U.S. at 419, quoted at JS 6. As discussed *supra*, *Local 807* had held that the Anti-Racketeering Act did not cover this relationship in *any circumstances*. In the Hobbs Act Congress established that *some* aspects of that relationship were to be covered; but it by no means follows, as the Government fallaciously assumes (JS 7), that *all* are.

The second paragraph of the Government's quotation from *Green* [12] on its face deals solely with the applicability of Title II of the Act (now embodied in U.S.C. § 1951(c)) which is, in effect, a proviso to the prohibition contained in Title I (18 U.S.C. § 1951(a) and (b)(2)). Appellees here do not rely on that proviso, but rather on the proposition that the acts charged in the indictment are not within the prohibition—in a word, that they do not constitute "extortion" for the reasons expressed above. As the Third Circuit has observed: "The exemption of certain labor union activities from the coverage of the act can be found in two places." *United States* v. *Sweeney*, 262 F. 2d 272, 276 n. 4. The "two places" are § 1951(c) and the definition of "extortion" in § 1951(b)(2).

The expressly enunciated narrowness of the holding in *Green* properly reflects the clear legislative intent. As originally proposed by Congressman Hobbs in 1942,[13] the Act would have carried over the language from the 1934 Act proscribing the obtaining "by the use of force, violence, or coercion, money or other valuable consideration" but without the exception upon which the *Local 807* case had turned.[14] At the hearings, representatives of labor criti-

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[12] JS 7.

[13] H.R. 6872, 77th Cong., 2d Sess.

[14] Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 77th Cong., 2d Sess. 4.

cized this language on the ground, among others, that it would apply not only to racketeering activities but to violence committed in the course of a collective bargaining dispute.[15] Even at this point in the bill's consideration, Hobbs was clear as to the limited application of his bill in the employer-employee context:

> "But what we are talking about here is where the *employment* is by duress or coercion. And that is all that the bill provides for." (Emphasis added.)[16]

In committee, the language of the bill was changed by Hobbs to its present form to make this intent perfectly clear. Thus, the reported bill omitted the language concerning "valuable consideration" and expressly proscribed "extortion" in terms identical to that in the Hobbs Act.[17] In his speech on the floor of the House, immediately prior to passage, Hobbs stated:

> "Now I want to say just a word about the law of this case. They ask: Why is this bill written the way it is? I will tell you why. Because the most distinguished lawyers that labor can employ some say at $50,000 each per year came before our Committee, men like the Honorable Joseph A. Padway came down to testify before us. I asked him: 'If this bill were rewritten so as to outlaw interference with interstate commerce by robbery or extortion, would you favor it?' He said: 'Why certainly I would; any honest man would favor that.'
>
> "So we rewrote the bill. This is not the bill upon which we held hearings. We held hearings upon a bill [H.R. 6872] very much like this old Copeland Act which would be if you adopt the LaFollette amendment which is to be offered. That was the bill we held hearings on. But when Mr. Tuttle of New York and Mr. Carson, General Counsel of another union, and all of labor's

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[15] *Id.* at 127, 284.
[16] *Id.* at 224-25.
[17] H. Rep. No. 238, 79th Cong., 1st Sess.

chosen spokesmen said that if we rewrote the bill and preserved the right to the four branches of labor's Magna Carta—and we did so—*and if we would just limit it to interference with interstate commerce by robbery or extortion* that would be all, they would all, they would all be for it. We rewrote the bill in its present form. While they have said a word since, they have not come here and inveighed against this bill because they knew that they wrote it themselves. They knew that Title I and Title III were rewritten at their dictation in our committee room virtually. That is why they have not been here." 91 Cong. Rec. 11912. (Emphasis added.)

It is, therefore, crystal clear that the Hobbs Act—tailored to overcome labor's objections and approved by the President [18]—was a statute directed by Congress solely at racketeering, including the kind of "employment by duress" situation involved in the *Local 807* case, and was not intended to apply to violence committed in the course of negotiation of a collective bargaining contract between an employer and the duly authorized representative of his employees for higher wages for services desired by said employer.

The Government sets out a single colloquy during the legislative debates in support of its construction of the Hobbs Act (JS 7-8). But the true import of that colloquy, once Congressman Michener's entire remark is reproduced, is that Congress sought only to reverse the particular result of the *Local 807* case:

"Mr. MICHENER. That is all there is to it. The only way labor is involved is that if these offenders belong to the union, and by robbery or exploitation collect a day's wage—a union wage—they are not exempted from the law solely because they are engaging in a legitimate union activity. *Mr. Speaker, I cannot under-*

[18] It will be recalled that in 1946 and 1947 President Truman vetoed the Case bill and the Taft-Hartley Act, respectively, on account of labor's objections thereto.

> *stand how any union man can claim that the conduct described by Mr. Justice Stone is a legitimate union activity. I have confidence that most of the rank and file of labor and my congressional district will so claim.* 91 Cong. Rec. 11843-11844. (Emphasis supplied to show portion omitted in Jurisdictional Statement.)

The conduct described by Mr. Justice Stone in his opinion in the *Local 807* case was that:

> "[The defendants], or some of them, lay in wait for trucks passing from New Jersey to New York, forced their way onto the trucks, and by beating or threats of beating the drivers procured payments to themselves from the drivers or their employers of a sum of money for each truck, $9.42 for a large truck and $8.41 for a small one, said to be the equivalent of the union wage scale for a day's work. In some instances they assisted or offered to assist in unloading the truck and in others they disappeared as soon as the money was paid without rendering or offering to render any service." 315 U.S. at 539.

And Mr. Justice Stone was careful to distinguish between such conduct, which he believed was forbidden by the Federal Anti-Racketeering Act, and union violence directed at legitimate labor objectives:

> *"Even though the procuring of jobs by violence is not within the Act,* and though this includes the 'stand-by' job where no actual service is rendered, the granted immunity, unless its words be disregarded, does not extend to the case where the immediate objective is to force the payment of money regardless of the victim's willingness to accept and treat the *extortioner* as an employee." Id. at 541. (Emphasis added.)

Thus, the legislative history lends no substance whatever to the Government's present construction of the Hobbs Act. And at least equally significant is "what Congress did not say." *Rewis* v. *United States,* 401 U.S. 808, 811-12. There is not a word in the legislative history which suggests that violence in the course of bona fide collective bargaining

negotiations was intended to be covered. This is particularly striking in light of the statement by the Court of Appeals for the Third Circuit "that some disorder is unfortunately quite usual in any extensive or long drawn out strike."[19] If that had been the target aimed at, surely the Committee report would have so indicated, or one of the sponsors would have so stated in the debates, giving as an example of the need for the bill some recent and notorious violent strike. To contend that Congress intended to subject union members who uttered threats or engaged in violence during an ordinary strike for wages to the extremely severe penalties prescribed in the Act, while avowing that it was only clarifying an anti-racketeering law, is a tacit slander of the legislative process.

Silence in the Act's *administration* is also highly persuasive. *United States* v. *Laub*, 385 U.S. 475, 485; *cf. Norwegian Nitrogen Products* v. *United States*, 288 U.S. 294. Before 1970 when the indictments herein and in *Caldes* were returned, there was only a single prosecution under the Government's present theory. That case was brought in 1962, and the one defendant who was tried under the Hobbs Act was acquitted. *United States* v. *George Samuel Webb* (N.D. Ala., No. 15080). In the twenty-five years since the Hobbs Act became law, there have been countless labor disputes in which there was some violence to persons or property; in some the strike was notorious and the violence serious. These events could hardly have escaped the attention of the United States Attorneys in the areas in which the strikes occurred or of the Justice Department. Many of them became matters of public notice additionally because they resulted in litigation either before the courts or the National Labor Relations Board. Yet no Hobbs Act prosecutions were instituted.[20]

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[19] *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F.2d 472 (3d Cir.), *cert. granted in part*, 310 U.S. 655, *modified on another point*, 311 U.S. 7.

[20] In one case of strike violence where a federal criminal prosecution was brought (on violence no less serious than that charged in the present indictment), the Government charged only a conspiracy to violate 18

Finally, the unsubstantiality of the Government's present construction of the Hobbs Act is shown by its necessity to invent "the concept of extortionate force" (JS 9). This phrase, like "extortionate means" (JS 7), appears to have been conceived for the purposes of this litigation to give the impression that the offense of extortion depends upon the degree of force employed, rather than its objects.[21] The argument was rejected in *Caldes* where it was first advanced (JS 23a-24a) and is without roots in the law of extortion as it has previously been understood. Rather, that understanding is reflected by the Government's argument to this Court in the *Local 807* case:

> "If the defendants had been seeking to achieve a legitimate labor objective, we doubt whether their activities would come within the scope of the Act simply because of the presence of violence. The whole tenor of the Act indicates that Congress intended to punish activities similar to extortion; *violence used as a means of obtaining a lawful labor union objective is not extortion but simply a breach of the peace or other kindred unlawful act.*" Brief for the United States, Nos. 131-132, O. T., 1941, p. 46. (Emphasis added.)[22]

U.S.C. § 1362 (destruction of means of communication) which carried a maximum penalty of five years; no count was included under the Hobbs Act, which reaches conspiracies and bears a penalty of twenty years. See *Abbatte* v. *United States*, 359 U.S. 187, 189.

[21] Neither of the two cases cited by the Government involved the issue, and the courts did not discuss, whether the Hobbs Act applies where proscribed *means* are employed in furtherance of a *legitimate objective*. Rather, both cases involved illegitimate objectives, and, indeed, plain common racket extortions. Thus, in *Battaglia* v. *United States*, 383 F. 2d 303 (9th Cir.), violence was employed to coerce the victim to enter into an unwanted business relationship with the defendant, an objective reminiscent of the employment by duress objective involved in *Local 807* and *Green*. In *United States* v. *Tropiano*, 418 F. 2d 1069 (2d Cir.), threats of violence were employed to force the victim to cease engaging in competitive business. Of course, as the Government concedes, neither case involved collective bargaining, or labor relations in any form.

[22] The implications of the Government's position in the instant case further reveal the unsubstantiality of such position. As the Ninth Circuit in *Caldes* recognized, "Under the Government's view, a labor union and its members would be guilty of extortion under Section 1951 if they strike for higher wages in violation of their collective bargaining agreement" (JS 25a). While such activity would be subject to certain federal

As we have shown, the Hobbs Act was adopted in response to the *Local 807* case and adopted the concept of "extortion" to allay the fears of the labor movement that the Act would be given an expansive interpretation. It is, therefore, inconceivable that the Act was intended to cover the activity charged in the indictment in this case, which the Government's own brief in the *Local 807* case declared "is not extortion."

Conclusion

For the foregoing reasons, the appeal should be dismissed or the judgment below should be affirmed without further argument.

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civil remedies, obviously it has never been considered to be "extortion" under the Hobbs Act.

The Government's effort (JS 10-11) to read *Caldes* as ruling only that minor violence is not an "extortionate means" would produce another strange consequence. The Ninth Circuit ruled (JS 19a) that the jury could logically conclude that "the violence was *intended* to pressure the company into an agreement." (Emphasis added.) If no distinction is to be made between legitimate and illegitimate objects, it would follow that minor violence intended for personal enrichment of faithless union officials (see cases cited at p. 6 n. 11, *supra*) would not be subject to the Hobbs Act—an absurd result which proves the unsound nature of the Government's theory.